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Public Prosecutor v Artur Peek & Ors

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPLICATION NO W-05(LB)-78–03 OF 2023
VAZEER ALAM, AZMI ARIFFIN AND KOMATHY SUPPIAH JJCA
8 MAY 2024

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Criminal Procedure — Arrest — Arrest and remand pending appeal against acquittal — Accused persons were foreign nationals — Accused persons charged under s 39B of Dangerous Drugs Act 1952 and s 9(1) of Poisons Act 1952 — Accused persons acquitted and discharged by High Court — Prosecution appealed against acquittal and discharge — Appeal pending before Court of Appeal — Prosecution filed application under s 56A of Courts of Judicature Act 1964 — Whether prosecution's appeal would be rendered nugatory if accused persons deported before appeal heard and disposed of — Whether there was a breach of accused's constitutional right under art 8 of the Federal Constitution — Whether application for arrest and remand pending appeal against acquittal ought to be allowed — Courts of Judicature Act 1964 s 56A — Dangerous Drugs Act 1952 s 39B — Federal Constitution art 8 — Poisons Act 1952 s 9(1)

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The respondents in the present case were all foreign nationals. They were charged with three counts of trafficking in dangerous drugs under s 39B of the Dangerous Drugs Act 1952 ('the DDA') and one count under s 9(1) of the Poisons Act 1952. However, the prosecution failed to establish a prima facie case against the respondents, consequently, they were acquitted and discharged. The prosecution appealed against the said decision and the appeal was now pending before the Court of Appeal. Pending such appeal, the prosecution filed the present application under s 56A of the Courts of Judicature Act 1964 ('the CJA') seeking an order of arrest and remand against all the respondents on the grounds that if the respondents were deported to their countries of origin before the appeal was heard and disposed, they would be beyond the court's jurisdiction and the appeal would be rendered academic and nugatory. In opposing the application, the counsel for the third respondent argued that that any detention of the third respondent pending disposal of the appeal on grounds that he was a foreigner would be a breach of his constitutional right under art 8 of the Federal Constitution on equal treatment before the law.

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Held, allowing the prosecution's application for the order of arrest and remand under s 56A of the CJA with the proviso for the grant of conditional bail (as per para 9 of the grounds of judgment):

(1) The court was mindful of the fact that if the respondents, who were foreign nationals, were to leave the jurisdiction of the court, then the probability of the appeal being rendered nugatory was heightened. The respondents were all charged with offences of trafficking in dangerous drugs under s 39B(2) of the DDA, which was a very serios offence that carried the death penalty. If the respondents were to leave the country and even if the appeal were to proceed in the absence of the respondents as was permitted by law, their subsequent extradition to Malaysia would be wrought with difficulty and in some cases, it would be an impossibility. In this regard, the court had taken judicial notice of the case of *Sirul Azhar*. Obviously, once a person facing a drug trafficking charge is out of jurisdiction, then the continuation of the trial or appeal would be a waste of public funds and judicial resources. The better alternative would be to balance the interest of the individual as against the state, and have the person detained under s 56A of the CJA, and if necessary, admit him to bail with appropriate conditions to secure his attendance at the hearing of the appeal (see para 11).

(2) Having regard to the cases of *Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785, and *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail* [2008] 4 MLJ 830, which the court was bound to follow by virtue of the doctrine of stare decisis, the court did not find merit in the arguments raised by learned counsel for the third respondent regarding the alleged infringement of the respondents' rights under art 8 of the Federal Constitution on equal treatment before the law (see paras 12–14).

(3) As noted by the Court of Appeal in *Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785, in the context of the present case, it was pertinent to note that an appeal was a continuation of a trial (see *Balasingham v Public Prosecutor* [1959] 1 MLJ 193, *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613). Consequently, upon the lodgment of an appeal to the present court against an order of acquittal by the High Court, the criminal proceeding against the respondents revived and continued. Hence, the power to remand the respondents and/or admit them to bail pending the disposal of the prosecution's appeal by the present court was necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the respondent (see para 15).

[Bahasa Malaysia summary

Responden-responden dalam kes ini semuanya adalah warga asing. Mereka didakwa atas tiga pertuduhan mengedar dadah berbahaya di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB') dan satu pertuduhan di bawah s 9(1) Akta Racun 1952. Bagaimanapun, pihak pendakwaan gagal membuktikan kes prima facie terhadap responden-responden, akibatnya, mereka dibebaskan dan

dilepaskan. Pihak pendakwaan merayu terhadap keputusan tersebut dan rayuan tersebut kini masih belum selesai di hadapan Mahkamah Rayuan. Sementara menunggu rayuan tersebut, pihak pendakwaan memfailkan permohonan di bawah s 56A Akta Mahkamah Kehakiman 1964 ('AMK') bagi memohon perintah tangkap dan reman terhadap semua responden atas alasan bahawa jika responden-responden dihantar pulang ke negara asal mereka sebelum rayuan didengar dan diputuskan, mereka akan berada di luar bidang kuasa mahkamah dan rayuan tersebut akan menjadi akademik dan sia-sia. Dalam menentang permohonan tersebut, peguam bagi responden ketiga berhujah bahawa apa-apa penahanan responden ketiga sementara menunggu pemberesan rayuan atas alasan bahawa dia adalah seorang warga asing akan melanggar hak perlembagaannya di bawah perkara 8 Perlembagaan Persekutuan berkenaan layanan sama rata di sisi undang-undang.

Diputuskan, membenarkan permohonan pihak pendakwaan untuk perintah tangkap dan reman di bawah s 56A AMK dengan proviso untuk pemberian jaminan bersyarat (mengikut perenggan 9 alasan penghakiman):

(1) Mahkamah menyedari hakikat bahawa jika responden-responden, yang merupakan warganegara asing, meninggalkan bidang kuasa mahkamah, maka kebarangkalian rayuan tersebut menjadi sia-sia akan meningkat. Responden-responden kesemuanya didakwa atas kesalahan mengedar dadah berbahaya di bawah s 39B(2) ADB, yang merupakan kesalahan yang sangat berat yang membawa hukuman mati. Sekiranya responden-responden meninggalkan negara ini dan walaupun rayuan diteruskan tanpa kehadiran responden-responden seperti yang dibenarkan oleh undang-undang, ekstradisi mereka ke Malaysia akan dilakukan dengan susah payah dan dalam beberapa kes, ia adalah mustahil. Berhubung dengan perkara ini, mahkamah telah mengambil notis kehakiman terhadap kes *Sirul Azhar*. Jelas sekali, apabila seseorang yang menghadapi pertuduhan mengedar dadah berada di luar bidang kuasa, maka perbicaraan atau rayuan yang diteruskan akan menjadi pembaziran dana awam dan sumber kehakiman. Alternatif yang lebih baik ialah dengan mengimbangi kepentingan individu dengan kepentingan negara, dan menahan orang tersebut di bawah s 56A AMK, dan jika perlu, membenarkan dia diikat jamin dengan syarat-syarat yang sesuai untuk memastikan kehadirannya pada pendengaran rayuan (lihat perenggan 11).

(2) Dengan mengambil kira kes-kes *Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785, dan *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail* [2008] 4 MLJ 830, yang mahkamah terikat untuk mengikutinya berdasarkan doktrin stare decisis, mahkamah mendapati bahawa tiada merit dalam hujah yang dibangkitkan oleh peguam terpelajar bagi responden ketiga berhubung dakwaan pelanggaran hak responden-responden di bawah perkara 8 Perlembagaan Persekutuan

mengenai layanan sama rata di sisi undang-undang (lihat perenggan 12–14).

(3) Seperti yang dinyatakan oleh Mahkamah Rayuan dalam *Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785, dalam konteks kes ini, adalah wajar untuk mengambil perhatian bahawa rayuan adalah kesinambungan perbicaraan (lihat *Balasingham v Public Prosecutor* [1959] 1 MLJ 193, *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613). Oleh yang demikian, apabila rayuan dikemukakan kepada mahkamah semasa terhadap perintah pembebasan oleh Mahkamah Tinggi, prosiding jenayah terhadap responden-responden dihidupkan semula dan diteruskan. Oleh itu, kuasa untuk menahan reman responden-responden dan/atau membenarkan mereka diikat jamin sementara menunggu pemberesan rayuan pihak pendakwaan oleh mahkamah semasa adalah perlu untuk melaksanakan bidang kuasa mahkamah dengan berkesan ke atas kesalahan yang didakwa dilakukan oleh responden (lihat perenggan 15).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)
Balasingham v PP [1959] 1 MLJ 193 (refd)
PP (Deputy Public Prosecutor) v Norman bin Ismail [2008] 4 MLJ 830; [2008] 5 CLJ 261, CA (folld)
PP v Bird Dominic Jude [2013] 6 MLJ 785, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 s 56A
Criminal Procedure Code s 425A
Dangerous Drugs Act 1952 s 39B, 39B(2)
Federal Constitution art 8
Poisons Act 1952 s 9(1)

Appeal from: Criminal Trial No WA-45A-27–09 of 2019 (High Court, Kuala Lumpur)

Sarulatha (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Affifudin Hafifi (with Amirrul Jamaluddin) (Salehuddin Saidin & Assoc) for the first respondent.
Anwar Ezzad bin Zainal (Shahra, Ezzad & Izyan) for the second respondent.
Fahri Azzat (with Ivan Teng) (Fahri, Azzat & Co) for the third respondent.

Vazeer Alam JCA:

[1] This is an application by the public prosecutor for an order of remand against the respondents pursuant to s 56A of the Courts of Judicature Act 1964 ('the CJA').

[2] The respondents were jointly charged with three counts of trafficking in dangerous drugs under s 39B of the Dangerous Drugs Act 1952 and one count under s 9(1) of Poisons Act 1952. The respondents pleaded not guilty to the charges and were tried. At the close of the prosecution's case, the High Court found that the prosecution had failed to establish a prima facie case, and accordingly the respondents were acquitted and discharged. The applicant appealed that decision to the Court of Appeal and the appeal is pending.

[3] The respondents are all foreign nationals where the first respondent, Artur Peek is a Russian citizen, while the second and third respondent, Ajithkumar and Prem Dass respectively, are Indian citizens. They were being held at the Bukit Jalil Immigration Depot pending deportation.

[4] The public prosecutor then filed this application to seek an order of arrest and remand against all the respondents under s 56A of the CJA primary on grounds that if the respondents were deported to their countries of origin before the appeal is heard and disposed, they would be beyond the court's jurisdiction and the appeal would be rendered academic and nugatory. The applicant further contended that the appeal has merit and there was a good chance of success.

[5] On 7 April 2023, an ex parte order for arrest and remand was granted by this court against all the respondents. A date for the inter partes hearing was then fixed. An affidavit was filed by Imelda Puyang Ajeng, a Malaysian, who was the lawful wife of the first respondent stating her willingness to stand as bailor and surety for the first respondent. The third respondent had vide his counsel filed written submission resisting the application. Counsel for the second respondent submitted orally.

[6] At the inter partes hearing, learned counsel for the third respondent in opposing the application submitted that:

(a) s 56A of the CJA does not distinguish between citizens and foreigners, it merely makes reference generally to accused persons, and as such, the fact that the respondents are foreigners has no bearing on the public prosecutor's application;

(b) the respondents are entitled to equal treatment under the law pursuant to art 8 of the Federal Constitution and that any detention of the third

respondent pending disposal of the appeal on grounds that he is a foreigner would be a breach of this constitutional right;

(c) the appeal would not be rendered nugatory or struck out by reason of the third respondent leaving the country as the prosecution can still proceed with the appeal by virtue of s 425A of the Criminal Procedure Code; and

(d) the contention that the appeal has merit, even if true, has no bearing on this application as s 56A of the CJA does not make reference to the merits of the appeal as a consideration.

[7] Further, and/or in the alternative, learned counsel for the third respondent submitted that if this court was minded to allow the application to remand the third respondent, s 56A of the CJA allows the exercise of the court's discretion to admit the third respondent to bail, and prayed for bail to be granted in such circumstance.

[8] Learned counsels respectively for the first and second respondents submitted that if the court was minded to allow the applicant's application, then their respective clients ought to be admitted to bail with appropriate conditions in order to balance the interest of the state as against that of the interest of their clients who had been acquitted of the charges by the trial court.

[9] Having considered the submissions, we unanimous allowed the application by the public prosecutor and granted the order to arrest and remand the respondents in prison under s 56A of the CJA until disposal of the pending appeal and further ordered that in the event any of the respondents were able to produce to the satisfaction of this court a valid travel document or passport together with a valid visa/permit to stay in Malaysia he would will be allowed bail on the following conditions:

(a) that the bail amount shall be RM70,000 with two sureties;

(b) that the travel document or passport is surrendered to the court; and

(c) that the respondent reports to the police station nearest to him on the first working day of each month.

[10] The Court of Appeal in *Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785 had laid down the principles for the court's exercise of its discretion under s 56A of the CJA, and we quote:

> [37] As we have explained earlier, the discretion of the court in making use of the power under s 56A, even though wide, is to be exercised judicially. Whether in the circumstances of the case, the attendance of the accused person at the hearing of the prosecution's appeal can best be secured by committing him to prison or admitting him to bail, is a matter which rests solely in the discretion of the court. It is

appropriate at this juncture, without laying down any inflexible rule, we set out the factors that this court should consider in exercising its jurisdiction under s 56A of the CJA. The list of the considerations is not exhaustive and there may be other considerations as well which may emerge from the facts and circumstances of each case. Generally speaking, this court would take into account the following:

(a) the order made must be objectively fair and proportionate;

(b) the discretion should never be exercised arbitrarily;

(c) the discretionary power should be sparingly invoked;

(d) the nature and seriousness of the offence;

(e) the accused person has been proven not guilty and has been acquitted; there is a presumption of innocence in favour of the accused person;

(f) it is in the interest of the public and the state to preserve the integrity of the prosecution's appeal;

(g) the absence or non-attendance of the accused person at the hearing of the prosecution's appeal will render the appeal nugatory;

(h) the length of time which is likely to take for the appeal to be heard;

(i) if bail is admitted, whether the security and conditions imposed will ensure the attendance of the accused person;

(j) the probability of the accused person absconding, if released on bail;

(k) a balance has to be struck between the right to individual liberty and the interest of the public and state; and

(l) where the issue relates to the safety and security of the state much weight will be given to the application of the public prosecutor.

[11] In coming to our decision, we had taken into account the above factors. We were mindful of the fact that if the respondents, who are foreign nationals, were to leave the jurisdiction of this court, then the probability of the appeal being rendered nugatory is heightened. The respondents were all charged with offences of trafficking in dangerous drugs under s 39B(2) of the Dangerous Drugs Act that carries the death penalty. Needless to say it is a very serious offence. Now, if respondents were to leave the country and even if the appeal were to proceed in the absence of the respondents as is permitted by law, their subsequent extradition to Malaysia would be wrought with difficulty and in some cases it would be an impossibility. We have taken judicial notice of the case of *Sirul Azhar*, where the public prosecutor's appeal proceeded in the absence of the accused/respondent who were then convicted by the Federal Court, the sentence could not be executed as he had fled to Australia and attempts to extradite were not fruitful because Australian law forbade any person facing the death penalty to be extradited. Obviously, once a person facing a drug trafficking charge is out of jurisdiction, then the continuation of

the trial or appeal would be a waste of public funds and judicial resources. The better alternative would be to balance the interest of the individual as against the state, and have the person detained under s 56A of the CJA, and if necessary admit him to bail with appropriate conditions to secure his attendance at the hearing of the appeal.

[12] As to the alleged infringement of the respondents' rights under art 8 of the Federal Constitution on equal treatment before the law raised by learned counsel for the third respondent, a similar argument was comprehensively dealt with by the Court of Appeal in *Public Prosecutor v Bird Dominic Jude* [2013] 6 MLJ 785, where after considering the various provisions of the law, the court stated unequivocally that:

> ... there can be no doubt that s 56A does not violate arts 5(1) and 8(1) of the FC. By virtue of s 56A read with art 121(1B) of the FC, this court, pending disposal of an appeal against an order of acquittal, is competent and empowered to cause an accused person to be arrested and committed to prison, or admit him to bail. This attempt by the respondent to strike down the judicial powers of this court, as encapsulated in s 56A of the CJA, is without any merit and must inevitably fail. Section 56A of the CJA is a valid and binding law.

[13] In this regard, it would be apposite to refer to another judgment of this court in *Public Prosecutor (Deputy Public Prosecutor) v Norman bin Ismail* [2008] 4 MLJ 830; [2008] 5 CLJ 261, where the purpose of s 56A of the CJA was considered:

> The consideration of the order for remand or bail requires the construction of the second limb of s 56A. This court has to exercise the discretion judicially and according to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case.
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> Although the exercise of discretion by this court is not unprincipled, it is impossible and impracticable to set out a rigid formula in this regard.
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> As a general rule, when an accused has been acquitted by the High Court, he remains a free man and every effort should be made to give effect to the order.
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> However, this general rule must now be read in conjunction with the provisions of s 56A as alluded to above. It is the duty of this court to ascertain the intention of Parliament as expressed in s 56A.
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> Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:
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> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred.
>
> The purpose of enacting s 56A may be discerned from the explanatory statement to the Courts of Judicature Amendments (No 2) Act 1975 Bill. The relevant portion of this explanatory statement reads as follows:

> This Bill seeks to amend the Courts of Judicature Act, 1964 ... for the following purposes:
>
> (a) ...
>
> (b) to empower the Public Prosecutor to appeal to the Federal Court against any decision made by the High Court in the exercise of its criminal jurisdiction at first instance.
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> The purpose of s 56A is clearly to empower the prosecution to appeal against an acquittal ordered by the High Court. By way of corollary, it is intended to preserve the integrity of the prosecution's appeal.
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> The amendment expressed in s 56A serves the specific purpose of ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the State.
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> It needs to be noted that an appeal is a continuation of a trial; see eg *Balasingham v Public Prosecutor* [1959] 1 MLJ 193 (HC) per Ismail Khan J (later CJ (Borneo).
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> The integrity of the prosecution's appeal can only be preserved if the accused is placed in such a position as to conduce to the hearing and determination of the appeal in due course, which can never be realised in the absence or non- attendance of the accused. Hence, s 56A must be construed so as to promote that purpose.

[14] Hence, having regard to these cases, which we are bound to follow by virtue of the doctrine of stare decisis, we did not find merit in the arguments raised by learned counsel for the third respondent. Wherefore, we allowed the application by the applicant for the order of arrest and remand under s 56A of the CJA with the proviso for the grant of conditional bail.

[15] As noted by this court in *Public Prosecutor v Bird Dominic Jude*, in the context of the present case, it is pertinent to note that an appeal is a continuation of a trial (see *Balasingham v Public Prosecutor* [1959] 1 MLJ 193, *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613). Consequently, upon the lodgment of an appeal to this court against an order of acquittal by the High Court the criminal proceeding against the respondents revives and continues. Hence, the power to remand the respondents and/or admit them to bail pending the disposal of the applicant's appeal by this court is necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the respondent.

Orders accordingly.

Prosecution's application for order of arrest and remand under s 56A of the CJA

allowed with proviso for grant of conditional bail (as per para 9 of grounds of judgment).

Reported by Dzulqarnain Ab Fatar